Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Policies Concerning	)	MM Docket No. 01-317
Multiple Ownership of Radio Broadcast	)	
Stations in Local Markets	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

REPLY COMMENTS OF NASSAU BROADCASTING II, L.L.C.

Pursuant to Sections 1.415 and 1.419 of the Federal Communications Commission's (the "Commission") Rules, Nassau Broadcasting II, L.L.C. ("Nassau") hereby submits its Reply Comments in response to the above-referenced Notice of Proposed Rulemaking.[1]

As outlined by Nassau in its initial Comments filed with the Commission in this proceeding on March 27, 2002, Nassau is the licensee of radio broadcasting stations operating in New Jersey and Pennsylvania, and programs several additional stations through time brokerage agreements. Nassau has also been a party to several assignment applications that have been subjected to the Interim Policy.[2]

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[1] Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets and Definition of Radio Markets, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19861 (2001) (NPRM); Order, DA-02-582 (rel. Mar. 8, 2002) (extending the Comment deadline to Mar. 27, 2002 and the Reply Comment deadline to April 24, 2002); Order, DA-02-946 (rel. Apr. 23, 2002) (extending the Reply Comment deadline to May 8, 2002).

[2] See Comments of Nassau Broadcasting, II, L.L.C., pp. 2-4.

I. CONGRESS PROVIDED A BRIGHT LINE RULE FOR THE COMMISSION TO ENFORCE UPON ENACTMENT OF SECTION 202(b).

Nassau supports the numerous parties filing comments in this proceeding that urge the Commission, as has Nassau, to recognize that Congress clearly intended that the radio ownership limits outlined in Section 202(b) of the Telecommunications Act of 1996 (the "Telecom Act") provide the standards for the Commission's public interest requirements.[3] In particular, it should be reiterated that Section 202(h) of the Telecom Act does not permit an expansion of regulation of local broadcasting and the Commission should be dissuaded from imposing an additional "competition review" on radio license assignments and transfers of control, as suggested in the NPRM. Any further review is unnecessary and beyond Congressional intent.

The Commission cannot ignore such overwhelming response in favor of a bright-line rule that comports with the unambiguous statutory mandate in Section 202(b). If the Commission concludes that some other analysis is warranted, it runs the risk of having made an arbitrary and capricious decision in light of the numerous comments urging for a particular outcome in this case—namely that Section 202(b) provides a definitive cap implicitly complying with the Commission's public interest mandate. The D.C. Circuit has explained that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[4] The Commission has a duty to respond to the weight of such numerous requests when promulgating a rule pursuant to its notice and comment procedures, and will

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[3] See, e.g., Comments of Cumulus Media, Inc., p. 16; Clear Channel Communications, Inc., p. 4; National Association of Broadcasters, pp. 4-14.

[4] GTE Service Corp. v. FCC, 205 F.3d 416, 421 (D.C. Cir. 2000).

have a difficult time rationalizing a rule that is counter to the opinions expressed by a majority of the interested commenting parties.[5]

The Commission should also acknowledge that in the interim since the initial Comment filing deadline, the D.C. Circuit issued its opinion in Sinclair Broadcast Group v. FCC,[6] where the Court substantially undid the Commission's duopoly ownership rule in regards to television ownership. In its analysis of the issue, the Court commented on Congressional treatment of radio ownership noting that "Congress itself revamped the landscape for radio ownership [and] the 1996 Act eliminated the numerical limit on national ownership and relaxed common ownership restrictions in local radio markets."[7] The Court clearly recognized that Congress took a deregulatory focus in radio ownership matters, in contrast to television. In light of the D.C. Circuit's decision in Sinclair and Fox Television Stations, Inc. v. FCC[8] (discussed in Nassau's comments filed on March 27, 2002), the Commission should refrain from enacting any rule that increases regulatory review, as suggested by the NPRM and the analysis currently being undertaken under the Interim Policy.

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[5] See Home Box Office v. FCC, 567 F.2d 9, 35-36 (D.C. Cir. 1977) (clarified in Air Transport Association of America v. FAA, 169 F.3d 1, 7 n.5 (D.C. Cir. 1999)).

[6] __ F.3d ____ (Slip. Op. No. 01-1079, Apr. 2, 2002).

[7] Id. at ___.

[8] 280 F.3d 1027 (D.C. Cir. 2002).

II. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO CONDUCT AN ANTITRUST ANALYSIS.

Nassau supports those parties that contend that the Commission is not empowered to conduct a full-fledged antitrust review of proposed radio combinations.[9] Nassau reiterates that any such market concentration analysis was specifically rejected by Congress when it passed the conference agreement that resulted in Section 202(b). The legislative history of the statute conclusively demonstrates that Congress specifically rejected any "market concentration" analysis by the Commission as it had appeared in the prior Senate version of the bill.[10] Additionally, any such review is repetitive of the competition analyses currently undertaken by the Federal Trade Commission and the Department of Justice.

III. THE COMMISSION SHOULD CONTINUE TO DETERMINE THE DEFINITION OF THE MARKET USING STATION CONTOURS.

Few commenting parties requested the use of Arbitron radio metropolitan areas as the relevant geographic market.[11] Nassau, along with the clear proponderance of other interested parties, requested that the Commission maintain its current market definition methodology, involving the use of overlapping contours.[12] Nassau experienced complications when the Commission used an Arbitron-defined market as a reference when analyzing its assignment applications involving stations located in the Trenton market. Blind

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[9] See, e.g., Comments of Cox Radio, Inc., p. 15; National Association of Broadcasters, pp. 29-30.

[10] See H. Rep. No. 230, 104th Cong., 2d. Sess. at 200 (Conference Report); Comments of Clear Channel Communications, Inc., pp. 7-8.

[11] See, e.g., Comments of Eure Communications, Inc.; United Church of Christ.

[12] See, e.g., Comments of Cumulus Media, Inc., p. 15; Cox Radio, Inc., pp. 3-6; Radio One, Inc., p. 6.

use of Arbitron's commercially driven market would cause the Commission to arbitrarily ignore certain realities within a particular market.[13]

With overlapping contour analysis, the Commission can more adequately assess the realities of the marketplace in which the proposed combination may occur, and as Cumulus Media, Inc. states, no other suggested alternative has been shown to produce better results.[14] By avoiding the use of Arbitron defined markets, which were not intended for regulatory review purposes, anomalous situations, like the example provided by Nassau concerning the Trenton, New Jersey, market, can be avoided.[15]

IV. CONCLUSION

Nassau urges the Commission to conclude that compliance with the local ownership rules provided by Congress is definitive with no need for any separate FCC competition review. The Commission should avoid conducting a duplicative antitrust analysis, for which it has no authority. Additionally, the Commission is urged to retain its current contour methodology analysis in determining the relevant market for purposes of the local ownership rules.

Unfortunately, this entire exercise in expanded regulation of local ownership of radio broadcasting stations will have occurred at a very substantial cost – financial and otherwise -- to radio operators like Nassau. As noted above, it is clear that under the Telecom Act,

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[13] For example, in the Trenton market, the most recent Arbitron report excludes WKXW even though it is licensed to the Trenton metro. As a result of this change, Nassau's pending assignment applications involving stations in the Trenton market were affected by the possible change in the number of stations in the market, based on Arbitron's random choice to change the location of WKXW. See Comments of Nassau Broadcasting II, L.L.C., pp. 8-9.

[14] See Comments of Cumulus Media, Inc., p. 15.

[15] See Comments of Nassau Broadcasting II, L.L.C., pp. 8-9 (describing the problem caused when Arbitron excluded WKXW from the Trenton market).

Congress intended that the local ownership limits outlined in Section 202(b) should be the final word on the matter. Specifically, the Telecom Act as enacted provided that there be no special "local concentration" review, as had been contemplated in earlier versions of the legislation. Moreover, the thrust of Section 202(h) is that the Commission should not expand such regulation of local radio ownership. But the Commission has nevertheless subjected many parties to such analysis anyway.

Until the adoption of the Interim Policy in the NPRM, there had not even been any articulation of how applications might even be evaluated where the Commission concluded that there were concerns about local ownership concentration. So, licensees like Nassau were forced to wait –for 3½ years in the Trenton case – until the Commission even articulated criteria to review this "problem," which , as noted above, Congress had already concluded was not a problem at all so long as applicants complied with the restrictions in Section 202(b) of the Act.[16] And in doing so, parties like Nassau had to spend hundreds of thousands of dollars to argue against regulatory actions for which there was no statutory basis in the first place. This entire exercise into antitrust review by the Commission has hardly been the high-water mark of Commission regulation.

Accordingly, for the reasons outlined herein, as well as those in Nassau's original Comments, Nassau urges that the Commission promptly conclude this rulemaking

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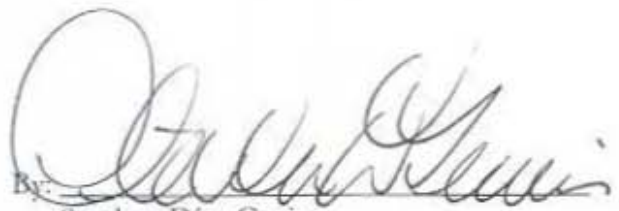
[16] As previously noted, in the Trenton case, this was further aggravated by the fact that after an exhaustive inquiry, the Department of Justice concluded that there were no competition problems posed by Nassau's acquisition.

proceeding and not adopt any rules that would have the effect of expanding regulation of local ownership where parties comply with the limits specifically enacted by Congress.

Respectfully submitted,

NASSAU BROADCASTING II, L.L.C.



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